

NO. 47599-5-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

RICHARD TURAY,

Respondent/Plaintiff,

v.

AL NERIO, MARY REGER, KRISTIN CARLSON, TODD DUBBLE,
BYRON EAGLE, ELENA M. LOPEZ, HOLLY CORYELL, JOHN SCOTT,

Appellants/Defendants.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

Appellants, employees of the Special Commitment Center (SCC) (hereinafter “SCC Employees”), seek reversal of the trial court’s denial of their Motion for Summary Judgment. The trial court erred by determining that there was a disputed material fact that precluded summary judgment in favor of the SCC Employees on Mr. Turay’s 42 U.S.C. § 1983 civil rights claim, and by determining that the SCC Employees were not entitled to qualified immunity from suit. Because correction of either error would result in the dismissal of Mr. Turay’s claim, and none of the arguments Mr. Turay has raised successfully refute that the trial court erred, this Court should order the dismissal of Mr. Turay’s suit.

II. ARGUMENT

Mr. Turay’s response brief repeatedly attempts to twist the applicable legal standards to fit the circumstances of his claims. For example, Mr. Turay’s allegation that he has been falsely accused of abusing his mother by Ms. Turay’s legal guardian is irrelevant to determining whether the trial court committed error by denying the Petitioners’ summary judgment motion. Brief of Respondent (Br. Respondent) at 6-8. Mr. Turay also cites no authority suggesting that the SCC has a constitutional duty to investigate a citizen report of harassment before temporarily restricting a resident’s phone use. Instead,

Mr. Turay distorts the legal standard to fit his view of the constitutional right. As submitted in the SCC Employees' opening brief, there is no constitutional right to communicate via telephone when other means of communicating with the outside world are available. *Valdez v. Rosenbaum*, 302 F.3d 1039, 1048 (9th Cir. 2002).

Mr. Turay also misstates the factual assertions made by the SCC Employees and claims that their counsel are attempting to mislead this tribunal. This baseless claim only distracts from the analysis that this Court must undertake in this case. Finally, Mr. Turay improperly attempts to seek affirmative relief as the respondent in this appeal.

A. Proper Analysis of the *Turner* Factors Shows That No Factual Issue Exists Regarding Mr. Turay's Claimed First Amendment Violation

Although Mr. Turay has attempted to recast his legal theory in his response brief, the sole legal theory asserted at the trial court was that his phone use rights were violated by the temporary phone use restriction because civilly detained individuals have a right to adequate unmonitored phone calls. CP 7-10. Mr. Turay agrees that the proper analysis of this constitutional right is by viewing the restriction in light of the four *Turner* factors. This right must be viewed "sensibly and expansively." *Thornburgh v. Abbott*, 490 U.S. 401, 417 (1989). In the context of the use of the telephone, the use of the telephone is but a means to exercise the

right to communicate with persons outside the institution walls. *Valdez*, 302 F.3d at 1048. This is the right that is protected when analyzing the *Turner* factors.

The first *Turner* factor is whether there is a valid, rational connection between the regulation and the government interest put forward to justify it. *Turner v. Safley*, 482 U.S. 78, 89-90 (1987). Mr. Turay argues that in order to be a valid governmental interest, the SCC would have had to establish proof of the harassment by court order or other evidence and the complaint from the person being harassed directly. Br. Respondent at 6-8. Ostensibly, the complaint would have to come from the person being harassed directly and not from the person's guardian. However, Mr. Turay cites no authority for this assertion. There is no requirement of an individualized finding prior to establishing a legitimate governmental interest. *Turner*, 482 U.S. at 92 (Finding no violation of prisoners' free speech right where, although they were precluded from communicating with fellow prisoners, the "regulation [did] not deprive prisoners of all means of expression."). A reasonable relationship between the governmental interest and the challenged restriction does not require an exact fit. *Mauro v. Arpaio*, 188 F.3d 1054, 1060 (9th Cir. 1999). "Moreover, it does not matter whether we agree with the defendants or whether the policy in fact advances the jail's

legitimate interests. The only question that we must answer is whether the defendants' judgment was 'rational,' that is, whether the defendants might reasonably have thought that the policy would advance its interests." *Id.* (internal citation and quotation omitted). Here, there is no question that the SCC has a strong interest in protecting the public from unwanted and harassing contact by SCC residents. *Overton v. Bazzetta*, 539 U.S. 126, 133 (2003) (protecting the public is a legitimate penological interest). Imposing a temporary phone restriction on a resident following a complaint of abuse and harassment carried out via telephone is a reasonable means of advancing the SCC's interest in protecting the public from this type of conduct.

The second *Turner* factor is whether alternative means of exercising the right at issue remains available to the detainee. Mr. Turay argues that his right to communicate was completely abrogated by the conditions imposed on Mr. Turay's contact. Mr. Turay even goes as far as to claim that the SCC Employees have misled this Court by asserting that he had alternative means to communicate with the outside world. This accusation mischaracterizes the argument presented by the SCC Employees. Mr. Turay's constitutional right to communicate with persons outside of the walls of the institution was not abridged because he retained alternative means to communicate with persons other than Betty

Turay. And the restrictions on communicating with Ms. Turay were reasonable because they were based on the allegations that he was harassing Ms. Turay by her guardian. The claim raised by Mr. Turay below was a complaint based on the phone use restriction. Mr. Turay retained the ability to utilize means other than the pay phone to communicate with persons (other than Ms. Turay) outside the institution.¹

The third factor of the *Turner* test is whether the accommodation of the asserted right will have a significant negative impact on the institution or other residents of the institution. Mr. Turay claims that the elimination of the SCC's ability to place the temporary phone restriction on him would have no significant impact on the institution or other detainees. However, absent the ability to impose a temporary phone restriction, the SCC would have had to allocate additional resources to

¹ Even if Mr. Turay had brought a claim based on the temporary restriction that prevented him from contacting Betty Turay, that claim also fails. Here, the guardian for Ms. Turay requested that the SCC assist in preventing the continued harassing contact. Imposing a contact restriction based on that request satisfies *Turner* because of the government's legitimate interest in protecting the public from harassment. See *Mondonedo v. Roberts*, No. 12-3045-SAC, 2013 WL 1087352, at *6 (D. Kan. Mar. 14, 2013) (unpublished) (citing a number of cases that upheld communication restrictions based on requests from the public); *Samford v. Dretke*, 562 F.3d 674, 679 (5th Cir. 2009) (upholding a communication restriction when requested by a parent of the victim). Further, even in the absence of a court order prohibiting contact, the State retains an interest in protecting the public from unwanted and harassing contact. *Samford*, 562 F.3d at 679. Although, *Samford* involved a request of no contact from a crime victim, as opposed to a request from a person being harassed, that fact is not dispositive of the finding of a rational relationship to a legitimate State interest. See *Guajardo v. Estelle*, 580 F.2d 748, 753 (5th Cir. 1978) (upholding institution's prohibition on inmates sending correspondence to persons who have objected to such correspondence), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401, 423-24 (1989).

monitor telephone conversations in order to ensure members of the public are not being harassed. *Valdez*, 403 F.3d at 1049. This would place a significant burden on the SCC Employees as well as the other residents. As Mr. Turay points out, the SCC has avoided monitoring resident phone calls.

Finally, the Court must consider whether there are ready, “obvious, easy alternatives” to the restriction. *Id.* Here, Mr. Turay, despite arguing the contrary position throughout this litigation and in his response brief, indicates that the SCC could have monitored Mr. Turay’s phone conversations with Betty Turay. Br. Respondent at 10-12. The temporary phone use restriction represents a reasonable compromise between completely unrestricted phone access and a more restrictive phone policy that includes monitoring of residents’ phone use. Further, the monitoring of phone calls is not an obvious, easy alternative that indicates that the restriction was an exaggerated response. *Valdez*, 403 F.3d at 1049.

Like the phone restriction upheld in *Valdez*, the four factors of the *Turner* test establish that the temporary phone use restriction here does not violate the First Amendment. *Id.* Because the SCC Employees established that they did not violate Mr. Turay’s constitutional rights, their motion for summary judgment should have been affirmed.

B. The SCC Employees Are Entitled to Qualified Immunity From Suit

Government officials are denied qualified immunity only if (1) the facts that plaintiff has alleged make out a violation of a constitutional right and (2) the right at issue was clearly established at the time of the alleged misconduct. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). The doctrine of qualified immunity provides immunity from suit where a constitutional right was violated where the contours of the right were not sufficiently clear so a reasonable official would understand what he is doing violates the right. *Saucier v. Katz*, 533 U.S. 194, 202 (2001), *overruled on other grounds by Pearson*, 555 U.S. at 232. As discussed herein, no constitutional right was violated, but even if this Court were to find that one had occurred, it was not clearly established when the phone restriction was placed on Mr. Turay. For the second inquiry, correct formulation of the right being asserted is critical to the analysis. *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). The Supreme Court has “repeatedly told courts . . . not to define clearly established law at a high level of generality.” *Id.* SCC Employees again assert that the properly specific formulation of the right at issue in this case is that of a civil detainee who has been the subject of allegations of abuse and harassment carried out by telephone to remain free from a temporary telephone

restriction that forbids him from contacting the subject of that alleged harassment. Mr. Turay has pointed to no authority that would establish this alleged right even existed. Certainly then, the state of the law was not so clear that every “reasonable official would understand” that imposing such a restriction, based on these facts, would violate this alleged right. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

In his response brief, for the first time, Mr. Turay recognizes that his access to the telephone may constitutionally be limited by reasonable restrictions. Br. Respondent at 14. This concession alone reflects that the SCC Employees are entitled to qualified immunity. Regardless, Mr. Turay fails to cite to any authority suggesting that a constitutional violation occurs when a detention facility places a detainee on a temporary phone restriction following allegations of abuse and harassment carried out via telephone, or temporarily precluding all contact with the alleged victim of the harassment based on a request from that person’s guardian. Instead, the case law clearly establishes that the SCC has an ability to place restrictions on the use of the phone. Finding a violation of the Constitution in this case would require the Court to define the right in such general terms that a reasonable official would not have understood that the restrictions placed on Mr. Turay would violate a constitutional right. Additionally, the right must not be defined in general terms as Mr. Turay

advocates. *City and County of San Francisco, California v. Sheehan*, 135 S. Ct. 1765, 1776 (2015) (“[q]ualified immunity is no immunity at all if ‘clearly established’ law can simply be defined as the right to be free from unreasonable searches and seizures”). Having failed to satisfy his burden of showing a clearly established constitutional violation based upon the undisputed record, the SCC Employees are entitled to qualified immunity.

Finally, contrary to Mr. Turay’s assertions, the court in *Turay v. Weston*, No. C91-0664 WD (W.D. Wash. 1994) did not recognize the constitutional right that Mr. Turay advocates. Rather, as part of the injunction, the court ordered that the SCC lift its prohibition on non-collect outgoing calls and stop monitoring residents’ phone calls. *Turay v. Seling*, 108 F. Supp. 2d 1148, 1157 (W.D. Wash. 2000). This order was not one of constitutional dimension, and the order is not the right that Mr. Turay is asserting in this case. Further, the *Turay* court cited approvingly to WAC 388-880-050(2)(f), which recognizes that SCC may place limitations on residents’ access to the phones. CP 34, 39-41. Rather, the constitutional right at issue in its most generalized terms, as explained by the *Valdez* court, is the right to communicate with persons outside the facility, and the use of the phones is but a means to exercise that right. *Valdez*, 302 F.3d at 1048. Mr. Turay does not have a right to

unimpeded phone use, and recognizing a violation of a constitutional right in this case would require an expansion of the previously recognized right to communicate with persons outside the facility. *al-Kidd*, 563 U.S. at 741 (finding that to overcome a qualified immunity defense, “existing precedent must have placed the statutory or constitutional question beyond debate”).

Because the SCC Employees proved that there was no violation of a constitutional right clearly established at the time of the alleged misconduct, they should have been granted qualified immunity.

C. Enforcement of the Phone Restriction Against Mr. Turay Did Not Violate Due Process

The phone restriction imposed did not violate either procedural or substantive due process. Mr. Turay asserts a procedural due process right with respect to the imposition of the phone restriction complaining that he was restrained from having contact with his mother without being afforded procedural due process. In order for procedural due process protections to be implicated, Mr. Turay must establish a state created liberty interest protected by the Constitution. *Valdez*, 302 F.3d at 1044. Here no state created liberty interest existed in the right to use the telephones, therefore any claim that relies on procedural due process must fail.

While Mr. Turay's due process arguments rely primarily on claims that he should have been afforded procedural due process prior to the imposition of the restrictions, any claim based on substantive due process would also fail. Substantive due process is violated if the restrictions imposed amount to punishment. *United States v. Salerno*, 481 U.S. 739, 746 (1987). If a particular restriction is reasonably related to a legitimate governmental objective, it is not punishment. *Bell v. Wolfish*, 441 U.S. 520, 539 (1979). The restriction at issue here is reasonably related to the SCC's legitimate governmental objective of protecting the community. The brief duration of the phone restriction further demonstrates that the restriction was not intended to punish. *Valdez*, 302 F.3d at 1046.

Because the SCC Employees established that the temporary phone restriction did not violate procedural or substantive due process, they are entitled to dismissal of that claim.

D. Counsel for the SCC Employees Did Not Mislead This Court in the Opening Brief

Mr. Turay improperly asserts that counsel for SCC Employees misled the Court with respect to assertions made in the opening brief. A full view of the record shows that these assertions are baseless. Mr. Turay's claim before the trial court related to the assertion that he had

a right to unmitigated access to the telephone. Therefore, the ruling below, and the briefing before this Court dealt with the issue of whether the SCC Employees violated Mr. Turay's claimed phone access rights. The SCC Employees argued that the correct formulation of the right in dispute was the right to contact persons outside the facility and that Mr. Turay retained alternative means to exercise that right. Counsel did not imply that Mr. Turay was allowed to contact Ms. Turay utilizing other means - as established by the evidence presented by the SCC Employees, all contact with Ms. Turay was restricted by both the SCC and the guardianship court's restraining order. Rather, the issue before the Court, based on Mr. Turay's claim at the trial court, was whether the temporary phone restriction violated Mr. Turay's constitutional rights given the fact that he retained other methods of communication with other people outside the institution.

Similarly, counsel for SCC Employees did not mislead the Court. Their citation to SCC Policy 203 as the internal method by which the SCC restricted Mr. Turay's phone use privileges was based on Mr. Turay's assertion of a right to unimpeded phone access. Mr. Turay's complaint and cause of action involves the limitations placed on his use of the telephone. Counsel did not cite to SCC Policy 203 as authority for the SCC to prohibit all communications from Mr. Turay to Betty Turay. Nor

did counsel imply that the constitutional inquiry is governed by the contents of an internal SCC policy. *See Case v. Kitsap County Sheriff's Dep't*, 249 F.3d 921, 930 (9th Cir. 2001) (internal policy violations are irrelevant to the issue of § 1983 liability).

Mr. Turay's unfounded accusations against the integrity of the counsel for the SCC Employees should be disregarded.

E. The Court Should Not Consider Mr. Turay's Untimely "Cross-Appeal"

Included in Mr. Turay's response brief is a request for this Court to consider a "cross-appeal" based on the dismissal of his loss of consortium claim. A notice of cross appeal is required if the respondent " 'seeks affirmative relief as distinguished from the urging of additional grounds for affirmance.' " *Robinson v. Khan*, 89 Wn. App. 418, 420 (1998) (quoting *Phillips Bldg. Co. v. An*, 81 Wn. App. 696, 700 n.3 (1996)).

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III. CONCLUSION

The trial court erred by determining that there was a disputed material fact that precluded summary judgment in favor of the SCC Employees and by determining that the SCC Employees were not entitled to qualified immunity from suit. Mr. Turay has not presented relevant authority to establish otherwise. Therefore, this Court should reverse the order of the lower court, and direct entry of summary judgment in favor of the SCC Employees.

RESPECTFULLY SUBMITTED this 31st day of May, 2016.

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CERTIFICATE OF SERVICE

Jeffrey S. Nelson, states and declares as follows:

I am a citizen of the United States of America and over the age of 18 years and I am competent to testify to the matters set forth herein.

I certify that on May 31, 2016, I served a true and correct copy of this **APPELLANTS' REPLY BRIEF** and this **CERTIFICATE OF SERVICE** by sending an electronic copy to Shannon Gill, Legal Coordinator at the Special Commitment Center, and upon information and belief, the same was printed and delivered to Respondent/Plaintiff Richard Turay, and a copy was also sent via U.S. Mail as follows:

Respondent/Plaintiff

Richard Turay
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PO Box 88600
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 31st day of May 2016, at Tumwater, Washington.



JEFFREY S. NELSON
Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

May 31, 2016 - 2:53 PM

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Appellants' Reply Brief

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